ATTORNEY FOR APPELLANT:

WILLIAM BYER, JR.
Byer & Byer
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

DEANNA L. BRUNNER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM DEWEY KING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0508-CR-785
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON COUNTY COURT
The Honorable David W. Hopper, Judge
Cause No. 48E01-0404-FD-182

August 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

William King appeals his conviction by jury of operating a vehicle with a BAC of .08 or more as a Class C misdemeanor[1] and operating a vehicle while intoxicated as a class D felony,[2] as well as his adjudication as an habitual substance offender.[3] King raises two issues, which we restate as:

I. Whether the trial court abused its discretion in admitting King's statements to Trooper Noone into evidence; and

II. Whether the trial court erred in granting the State's motion to amend the charging information.

We affirm.

At approximately 11:00 p.m. on March 3, 2003, Indiana State Police Trooper Chris Noone was patrolling a residential area in Madison County when he noticed a GMC truck veering to the left of the center line. Trooper Noone followed the truck for three blocks, and when he noticed the truck veer to the left of the centerline more than once, the Trooper initiated a traffic stop. When he approached the truck, the Trooper smelled the odor of an alcoholic beverage coming from King, the truck's driver.

Trooper Noone also observed that King had glassy eyes and his hands were unsteady. King, who told Trooper Noone that he had been drinking alcoholic beverages, subsequently failed three standard field sobriety tests. King also told Trooper Noone that he (King) felt like he should not be driving and that he would not pass a breath test.

---

[1] Ind. Code § 9-30-5-1 (2004).

[2] Ind. Code § 9-30-5-3 (2004).

[3] Ind. Code § 35-50-2-10 (2004) (subsequently amended by Pub.L. No. 213-2005, § 5 (eff. May 11, 2005)).

Trooper Noone advised King of Indiana's Implied Consent Law, and King submitted to a breath test that revealed he had a .08 BAC.

The State charged King with count I, operating a vehicle with a BAC of .08 or more, a class C misdemeanor; count II, operating a vehicle while intoxicated, a class C misdemeanor; count III, operating a vehicle while intoxicated with a prior conviction of operating while intoxicated, a class D felony; and count IV, being an habitual substance offender. King filed a motion to suppress his statements to Trooper Noone, which the trial court denied. The trial court subsequently admitted King's statements into evidence at trial over King's objection.

Following the first phase of trial that covered counts I and II, the jury found King guilty of operating a vehicle with a BAC of .08 or more but acquitted him of driving while intoxicated, both class C misdemeanors. During the second phase of trial that covered count III, operating a vehicle while intoxicated with a prior conviction of operating while intoxicated, a class D felony, King filed a motion to dismiss. King argued that count IV should be dismissed because the jury acquitted him of count II. The State responded that King was arguing a technicality because he was convicted of operating a vehicle with a BAC of .08 or more, which is also a class D felony with a prior conviction,[4] and asked the trial court for permission to amend the information. The trial

[4] Ind. Code § 9-30-5-3 provides in relevant part as follows:

> A person who violates section 1 or 2 [Ind. Code § 9-30-5-1 or Ind. Code § 9-30-5-2] of this chapter commits a Class D felony if: (1) the person has a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter. . . .

court found that although the wording of the count could have been more artful, it was not fatal to the State's case, and denied both King's motion to dismiss and the State's motion to amend. The jury found King guilty of count III.

Before the third phase of trial on count IV, the habitual substance offender charge, the State moved to amend the information. Specifically, the State sought permission to amend the date of the occurrence of one of the underlying offenses from March 6, 1996 to February 1, 1999. The court granted the motion, and the jury adjudicated King to be an habitual substance offender.

I. Admission of Evidence

The first issue is whether the trial court abused its discretion in admitting King's statements to Trooper Noone into evidence.[5] We review a trial court's decision to admit evidence for an abuse of discretion. Crafton v. State, 821 N.E.2d 907, 910 (Ind. Ct. App. 2005). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. Id.

King contends that the trial court should not have admitted his statements into evidence because he did not receive Miranda warnings. Rights under Miranda apply only to a custodial interrogation. White v. State, 772 N.E.2d 408, 412 (Ind. 2002). Under Miranda, an interrogation includes express questions and words or actions on the part of

---

[5]King argues that the trial court erred in denying his motion to suppress these statements. However, once the matter proceeds to trial, the question of whether the trial court erred in denying the motion to suppress is no longer viable. Kelley v. State, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). Rather, the claim on appeal becomes whether the trial court erred in admitting the evidence at trial. Id. at 425.

the police that the police know are reasonably likely to elicit an incriminating response from the suspect. Id. Volunteered statements do not amount to an interrogation. Id.

Here, King's statements that he had been drinking alcoholic beverages and that he felt like he should not be driving and would not pass a breath test were utterances not made in response to any questions, words, or actions on the part of the police, and thus were admissible. See id.

Further, even if King's statements to Trooper Noone were not admissible, their admission would be, at most, harmless error. See Van Pelt v. State, 760 N.E.2d 218, 224 (Ind. Ct. App. 2001), trans. denied. An error in the admission of evidence is not prejudicial if the evidence is merely cumulative of other evidence properly admitted at trial. Id. Here, King's statements were merely cumulative of his .08 BAC breath test results and not grounds for reversal of his conviction. The trial court did not err in admitting King's statements into evidence. See, e.g., White, 772 N.E.2d at 408.

II. Amendment to the Information

The second issue is whether the trial court erred in allowing the State to amend count IV of the information.[6] As filed, count IV of the information read as follows:

> Further, the defendant committed another substance offense, to wit: Operating While Intoxicated, and on or about November 30, 1999, in the County Court II of Madison County (Cause No. 48E02-9902-DF-28), State of Indiana, the same William D. King was convicted of said substance offense having occurred on March 6, 1996.

[6] King also contends that the trial court erroneously permitted the State to amend count III of the information. However, our review of the record of the proceedings reveals that although the State moved the court to amend count III after King filed a motion to dismiss it, the trial court found that an amendment was unnecessary and denied the State's motion. The court also denied King's motion to dismiss count III. King does not challenge the denial of his motion to dismiss.

> Further, the Defendant committed another substance offense, to wit: Operating While Intoxicated, and on or about September 28, 1998, in the County Court II of Madison County (Cause No. 48E02-9603-DF-086), State of Indiana, the same William D. King was convicted of said substance offense, said offense having occurred on March 6, 1996.

Appellant's Appendix at 16.

Before the third phase of trial, the State moved to amend count IV of the information. Specifically, the State sought to amend the date of the occurrence of the first underlying offense from March 6, 1996, to February 1, 1999. The trial court granted the amendment, and King claims that the trial court erred.

The purpose of the charging information is to ensure that the accused is afforded certain protections, and to apprise him of the nature of the accusation made, so that preparations for mounting a defense can be made. Hancock v. State, 758 N.E.2d 995, 1001 (Ind. Ct. App. 2001), aff'd in part and vacated in part on other grounds, 768 N.E.2d 880 (Ind. 2002). Amendments to the charging information are governed by Ind. Code § 35-34-1-5, which provides in relevant part as follows:

> (c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.
>
> (d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

To avail himself of the remedies provided by the statute, King could have requested a continuance as soon as the trial court overruled his objection to the State's amendment. See Hancock, 758 N.E.2d at 1002. By failing to avail himself of the remedy found in Ind. Code § 35-34-1-5(d), King has waived this issue for review. Id.

Waiver notwithstanding, King's argument fails because he has failed to demonstrate how the State's amendment has prejudiced his substantial rights. See id. These substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge. Id. If the amendment does not affect any particular defense of change the positions of either of the parties, it does not violate these rights. Id. Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges. Id.

Ind. Code § 35-50-2-10(c) provides that the State may seek to have a person sentenced as a habitual substance offender for any substance abuse by alleging that the person has accumulated two prior unrelated substance offense convictions. Thus, it is the fact and date of the conviction that puts the defendant on notice to prepare for and defend against the charges, not the date the offense was committed.

Here, count IV put King on notice that prior convictions on November 30, 1999, and September 28, 1998, were being used to prove his status as an habitual substance offender. In addition, count IV included the cause numbers of the offenses that were being used. The fact that the State amended the date that one of the offenses occurred did not affect King's defenses or the position of either of the parties. King's substantial

rights were therefore not affected by the amendment, and the trial court did not err in granting the State's motion.

For the foregoing reasons, we affirm King's convictions for operating a vehicle with a BAC of .08 or more, a class C misdemeanor, and operating a vehicle while intoxicated with a prior conviction of operating a vehicle while intoxicated, a class D felony, as well as his adjudication as an habitual substance offender.

Affirmed.

NAJAM, J. and ROBB, J. concur